Our rules of procedure are distinctly English. Both in England and Australia applications such as the one here are commenced by petition and I can see no reason why we should not follow the same procedure.

I, therefore, hold that the correct procedure to commence an application under section 181 of the Companies Act, 1965 is by petition and accordingly these proceedings are properly commenced.

Order accordingly.

Solicitors: *Sharma & Co.; Skrine & Co.*

PUBLIC PROSECUTOR v. DATUK TAN CHENG SWEE & ORS.

[O.Cr.J. (Ajaib Singh J.) May 5, 1979]

[Malacca — Criminal Trial Nos. 1, 2 & 3 of 1977]

Criminal Law and Procedure — Charge of corruption — Whether Commissioner of Malacca Municipality a public officer — Meaning of "public officer" — Corrupt practice — Mens rea not established — Municipal Ordinance (S.S. Cap. 133), ss. 396(1) — Prevention of Corruption Act, 1961 (Act 57), s. 21 — Emergency (Essential Powers) Ordinance, 1970, s. 2 — Interpretation Act, 1967, s. 3 — Federal Constitution art. 132(1).

In this case the first accused had been charged as a public officer in his capacity as Commissioner of the Malacca Municipality with corrupt practice in the approval of plans. The other accused had been charged with abetment of the offence. At the original trial the learned trial judge acquitted all the accused — See [1979] 1 M.L.J. 166. The Public Prosecutor, appealed against the acquittal of the first, second and fourth accused but not against the acquittal of the third accused. The Federal Court set aside the order of acquittal in respect of the first and second accused — the first and second respondents — and directed that they be called on for their defence. The acquittal of the fourth accused was upheld — See [1979] 1 M.L.J. 166 at p. 174.

Held, acquitting the accused: (1) although the decision of the Federal Court on the meaning of the term "public officer" is not authoritatively binding, it should not be disregarded in this case;

(2) the prosecution has failed to prove beyond reasonable doubt that the first accused knew that the files which he was dealing with when he signed his approval were those of Almac, with which he was connected. When the plans were approved, the first and second accused derived no pecuniary or other advantage over and above their lawful shares from the profits of Almac;

(3) there was no evidence to connect the second accused with the first accused in the sense that he had instigated or conspired or intentionally aided in the commission of any offence by the first accused.

Cases referred to:-

(1) *Public Prosecutor* v. *Phee Joo Teik* [1962] M.L.J. 56.
(2) *R.* v. *Samuel Vaughan* 98 E.R. 308.
(3) *Henley* v. *The Mayor and Burgesses of Lyme* 103 E.R. 995.
(4) *R.* v. *Whitaker* [1914] 3 K.B. 1283.
(5) *Dilworth v. Commissioner of Stamps* [1899] A.C. 99, 105.
(6) *Haydon* v. *Kent County Council* [1978] 1 Q.B. 343.

CRIMINAL TRIAL.

Dato Abu Talib bin Othman, Solicitor-General, (*T.S. Sambanthamurthi* with him) for the Public Prosecutor.

M. Shankar for the 1st accused.

Sulaiman C. Navarednam for the 2nd accused.

Ajaib Singh J.: The 1st accused in this case was charged with three counts under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970. The 2nd accused was charged with abetting the 1st accused on the 1st and 2nd charges under section 109 of the Penal Code while the 3rd and 4th accused were charged with abetting the 1st accused on all the three charges. At the close of the case for the prosecution on February 4, 1978 I acquitted and discharged all the four accused without calling for their defence on the ground that the prosecution had failed to prove that the 1st accused was a public officer within the meaning of section 2 of the Prevention of Corruption Act, 1961 (Revised — 1971) and that the prosecution had not produced sufficient evidence against the remaining three accused to establish *mens rea* or the intent to aid and abet the commission of the principal offences.

The Public Prosecutor appealed against the acquittal of the 1st, 2nd and 4th accused but not against the acquittal of the 3rd accused. On October 21, 1978 the Federal Court set aside the order of acquittal in respect of the 1st and 2nd accused and directed that they be called upon to make their defence. The acquittal of the 4th accused was upheld.

The 1st and 2nd accused have now given evidence on oath and they have adopted their statements which they had given to the police and which were admitted in evidence during the case for the prosecution. In his defence the 1st accused stated that as the Commissioner he had no choice but to sign the minutes which related to the lay-out and building plans and he did so in good faith. He said that he relied entirely on the recommendations of the Municipal Engineer and those of the Building Sub-Committee and he always accepted their recommendations whether they were for approval or for rejection of the plans. He did not go to the Municipality every day. He went there when he was free and he would spend about half an hour to one hour in his room where he would have about 30 to 40 files to deal with. The files would be lying in a corner of the room and the office boy would bring them up to his table and open 10 to 15 files at a time — all opened at the relevant pages and pass them over to him. He would look at the rubber stamp and would sign at the appropriate minutes and put away the opened files on one side of the table. The office boy would then pass over another set of opened files to be signed. When he had signed all the files the office boy would take them away to the Municipal Engineer's Department. After he had signed the files he never saw them again until they were shown to him by the police when they recorded his statement.

The 1st accused said that when he signed the minutes relating to the three charges as well as the minutes in the amalgamation and sub-division files he was not aware who the applicants were. He merely followed the recommendations and signed his approval. He was not aware that the files related to Almac and even if he knew it he would still have signed his approval because that was his duty and he was acting in good faith on the recommendations of the Building Sub-Committee. He denied that he had specially invited the 2nd accused to sit at the second meeting of

the Board of Directors of Almac held on June 4, 1974. He said that the meeting was held at the Malacca Chinese Football Club premises. The 2nd accused happened to be there for lunch and he was casually asked to join the Board members. The meeting was held while they had their lunch but the 2nd accused did not take any part in the discussions.

In his defence the 2nd accused said that he was a member of the Building Sub-Committee and he signed the recommendations for the approval of the plans together with the other members of the Building Sub-Committee and in doing so he and the others in the Sub-Committee followed the recommendations of the Municipal Engineer. It was the duty of the Municipal Engineer to ensure that all building plans complied with the statutory requirements. The Building Sub-Committee relied entirely on the recommendations of the Municipal Engineer which the Sub-Committee always accepted. He was a mere shareholder of Almac and he was therefore not obliged to disclose his interest in Almac to the Building Sub-Committee when Almac's plans were being approved.

The 2nd accused also said that he attended the second Board Meeting of Almac on June 4, 1974 at the invitation of one of the directors of Almac. He happened to be at the premises at that time and was asked to sit with them. But he did not take any part in the discussions and neither did he later receive the minutes of the meeting.

In his submission at the close of the case for the defence Mr. Shankar for the 1st accused said that when the 1st accused signed his approval of the plans he believed that it was his duty to do so and he agreed with the recommendations of the Building Sub-Committee. In signing his approval the 1st accused did not abuse his position as the Commissioner. He acted in good faith and had no ulterior motive. Almac was legally entitled to have its plans approved just like plans of any other applicant. The Municipal Engineer and the Building Sub-Committee recommended the approval of the plans and the 1st accused merely accepted their recommendations. It was submitted that by virtue of the doctrine of necessity the 1st accused had no choice but to approve the plans because that was his legal duty which had been cast upon him and upon him alone.

Next Mr. Shankar submitted that the 1st accused had a complete defence under section 396(1) of the Municipal Ordinance and section 76 of the Penal Code which are as follows: —

Section 396(1) of Municipal Ordinance —

"No matter or thing done and no contract entered into by the Commissioners and no matter or thing done by any Commissioner or by any officer of the Commissioners or other person whomsoever acting under the direction of the Commissioners shall, if the matter or thing was done or the contract was entered into bona fide for the purpose of executing this Ordinance, subject them or any of them personally to any action, liability, claim or demand whatsoever."

Section 76 of Penal Code —

"Nothing is an offence which is done by a person who is, or who, by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be, bound by law to do it."

It was submitted that these two sections protected the 1st accused from criminal liability and afforded him a complete defence in law. The 1st accused was only doing his duty in compliance with the provisions of the Municipal Ordinance and he honestly believed that he was bound by law to approve the plans of Almac. He could not therefore be guilty of any corrupt practice.

I think I shall say it here at once that I do not agree with Mr. Shankar that section 396(1) of the Municipal Ordinance or section 76 of the Penal Code provides a complete defence in law to the 1st accused on the charges which have been preferred against him. Section 396(1) of the Municipal Ordinance protects the Commissioners and other individuals mentioned in the section from personal liability arising from acts done *bona fide* for the purpose of executing the provisions of the Municipal Ordinance. But this section 396(1) will not exonerate a Commissioner if in doing any act for the purpose of executing the provisions of the Municipal Ordinance he commits a corrupt practice under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 because his act in executing the provisions of the Municipal Ordinance would then not have been done in good faith. Section 76 of the Penal Code can also have no application in this case because if there was any mistake at all it was one of law and not of fact. And *ignorantia juris non excusat.*

Mr. Shankar submitted that the 1st accused did not know that he was signing Almac's plans. Also Almac was not given any priority as its files appeared somewhere along the line in the schedules which were up for discussion by the Building Sub-Committee. It was also submitted that any pecuniary or other advantage was not for Datuk Tan Cheng Swee who was a minority shareholder in Almac. Any advantage would go not to him but to the company. It was also not certain whether the net result would have been an advantage or a liability to the company in the housing development business. Whatever the position the advantage could not be equated to a statutory entitlement. It was certainly not a sort of advantage as envisaged in section 2 of the Prevention of Corruption Act. The 1st accused did not participate in the deliberations of the Building Sub-Committee and he signed the plans as a matter of routine.

Mr. Navarednam for the 2nd accused submitted that the 2nd accused was only a member of the Building Sub-Committee which always accepted the recommendations of the Municipal Engineer and thereafter the Sub-Committee would recommend approval to the 1st accused. All plans were processed in the normal manner and thousands of such files were dealt with by the Building Sub-Committee. It was submitted that the 2nd accused was present at the second Board Meeting of Almac by invitation but he did not take part in any discussion. As a mere shareholder the 2nd accused was not obliged to disclose his interest in Almac to the Building Sub-Committee. The 2nd accused acted in good faith and there was no intention on his part to aid or abet the 1st accused. The element of *mens rea* was totally absent.

Dato' Abu Talib bin Othman the learned Solicitor-General submitted that the High Court has held that the 1st accused committed a corrupt practice as defined in the Emergency (Essential Powers) Ordinance No. 22 of 1970 and this was confirmed by the Federal Court. *Mens rea* was necessary but not in the sense as suggested by the defence. Both the 1st and 2nd accused had the necessary knowledge and intent. The 1st accused who was the Commissioner knew that he was approving Almac's plans and in doing so he was exercising his powers as the Commissioner. He knew that the approval of the plans would enable Almac to proceed with the Building project and get profits and as a shareholder of Almac the 1st accused would thereby derive financial benefit. There was therefore *mens rea* in the exercise of his official function and in deriving of financial benefit.

The Solicitor-General also submitted that the reason for inviting the 2nd accused to the Board Meeting was to warn him that Almac's applications would be coming up before the Building Sub-Committee so that there should be smooth sailing of the plans. It was submitted that *mens rea* was present in the case of both the 1st and 2nd accused because they had an interest in Almac for making money, the feasibility study was based only on housing development, the projected prices and types of houses were discussed at the second Board Meeting with a view to making profits and they both knew that the plans had to be approved by the 1st accused who was the sole approving authority.

The prosecution in this case has to establish two ingredients in order to secure a conviction against the 1st accused namely that he was a public officer and that while being such officer he committed a corrupt practice. For the purpose of section 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970 "public officer" has the meaning assigned to it in section 2 of the Prevention of Corruption Act which states that a public officer includes any person in the permanent or temporary employment of a public body. The term public body itself is defined in the Prevention of Corruption Act as follows: —

(a) the Government of Malaysia;

(b) the Government of a State;

(c) any department, service or undertaking of the Government of Malaysia or a State;

(d) any corporation, council, board, commissioners or other body which has power to act under and for the purpose of any written law in force in Malaysia or any part thereof relating to local government, public health or undertakings of public utility, or otherwise has power to administer funds belonging to any Government in Malaysia, or money raised by rates, taxes or charges in pursuance of any written law in force in Malaysia or any part thereof.

On the first ingredient the Federal Court has ruled that the 1st accused was a public officer. It said that the definition of a public officer in the Prevention of Corruption Act is not restricted to any person in the permanent or temporary employment of a public body. It includes but is not restricted to such a person. The cases of *Public Prosecutor* v. *Phee Joo Teik*,[1] *R.* v. *Samuel Vaughan*,[2] *Henley* v. *The Mayor and Burgesses of Lyme*[3] and *R.* v. *Whitaker*[4] were referred to in the Federal Court judgment. The first case concerned the position of a public servant under the Penal Code while the other cases referred to public officer and public office under the common law. The Federal Court also rejected the defence contention that the 1st accused as the sole Commissioner should be treated as a public body within the meaning of that term in the Prevention of Corruption Act. It was stated that the use of the plural "commissioners" in the definition of a public body in the Prevention of Corruption Act was of significance and pointed to the correct interpretation and therefore the word "commissioners" meant the commissioners collectively as a body and not an individual commissioner.

The defence has now made no submission on the definition of a public officer. However I have myself looked into this matter again and have come across certain matters which I think deserve consideration with a view to a reconsideration of the question whether or not the 1st accused was a public officer within the meaning of that term in the Prevention of Corruption Act, 1961.

The word "include" is discussed in *Stroud's* Judicial Dictionary where the observations on this word by Lord Watson in the case of *Dilworth* v. *Commissioner of Stamps*[5] appear as follows: —

> "'Include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

In a recent case Lord Denning M.R. quoting from the *Shorter Oxford English Dictionary* said that the word "includes" may well mean comprise or embrace. The Master of The Rolls was discussing the phrase "maintenance includes repair" in section 295 of the Highways Act, 1959 and his interpretation of this phrase was that "If one says that "maintain" comprises or embraces repair, that only means that it embraces repair without necessarily embracing anything else.". (See *Haydon* v. *Kent County Council* (*C.A.*).[6] It must be pointed out here that the two Lords Justices of Appeal who sat with Lord Denning M.R. in this case had a different view on the interpretation of the phrase "maintenance includes repair". In their view the meaning of the word "maintenance" was wider in scope and was not restricted to repair only.

To what extent will the observations of Lord Watson and those of Lord Denning M.R. apply to any case must necessarily depend on the language used in the particular legislation which may be involved in the case. And considered solely in the context of the Prevention of Corruption Act, 1961 and the Emer-

gency (Essential Powers) Ordinance No. 22 of 1970 these observations have no effect on the ruling of the Federal Court on the definition of a public officer.

The next point which I have to make may be worthy of more serious consideration. The Federal Court said in its judgment that —

"A public officer for the purposes of the Ordinance No. 22 of 1970 is by reason of the use of the word 'includes' in contradistinction to the narrower term 'means', not restricted to the class of persons in the temporary or permanent employment of a public body. We shall not attempt, even if we are capable of it, an exhaustive definition of a public officer, where the Legislature has failed to provide."

With respect, I think it may not be quite right to say that the Legislature has failed to provide an exhaustive definition of a public officer. The Legislature has in fact, as I have now discovered, provided a fairly elaborate definition of a public officer. Under section 3 of the Interpretation Act, 1967 which applies in this case a public officer is defined as a person lawfully holding, acting in or exercising the functions of a public office and public office itself is defined in the Interpretation Act as an office in any of the public services. Public services under the Interpretation Act are stated to mean the public services mentioned in Article 132(1) of the Federal Constitution and this Article 132(1) sets out a list of public services as follows —

(a) the armed forces;
(b) the judicial and legal service;
(c) the general public service of the Federation;
(d) the police force;
(e) the railway service;
(f) the joint public services mentioned in Article 133;
(g) the public service of each State; and
(h) the education service.

Public officer is thus adequately defined in the Interpretation Act, 1967. But section 2 of the Prevention of Corruption Act goes further by stating that a public officer includes any person in the permanent or temporary employment of a public body. Consequently the Legislature in effect says that a public officer is not only a person who is defined as such in the Interpretation Act but is also any person who is in the permanent or temporary employment of a public body. The definition of a public officer is thus complete and exhaustive and therefore by applying the principle *expressio unius exclusio alterius* the position of the 1st accused may well be considered only within the limits of this definition in the Interpretation Act and in section 2 of the Prevention of Corruption Act. If the rule *expressio unius* applies as aforesaid then any reference to the definition of a public officer under the common law of England or to that of a public servant in the Penal Code has to be excluded in defining a public officer under section 2 of the Prevention of Corruption Act, 1961. So for these reasons if I were now to decide again whether or not the 1st accused was a public officer I would say that he was not for it cannot be denied that the 1st accused was not a member of any of the public services listed in Article 132(1) of the Federal Constitution and that he was neither a permanent or temporary employee of a public body.

It may also be of significance to note that under the Interpretation Act it is stated that words and expressions in the singular include the plural and words and expressions in the plural include the singular so that the word "commissioners" in the definition of a public body in the Prevention of Corruption Act may well include a single commissioner.

A decision of the Federal Court is binding on all courts subordinate to it unless that decision can be distinguished from any subsequent case in those courts. For a moment I thought I would depart from the decision of the Federal Court in this case on the ground that its *ratio decidendi* turned upon a consideration of the definition of a public officer under the common law and that of a public servant under the Penal Code but that the applicability and effect of the definition of a public officer under the Interpretation Act was not argued or considered. There was no discussion at all in the Federal Court over the applicability and effect of the definition of a public officer under the Interpretation Act and consequently this point was not considered by the Federal Court in arriving at the conclusion that the 1st accused was a public officer. And if I am correct in saying that the question which was not argued or considered was actually relevant and involved in the present case then I would with respect say that the Federal Court decision is not an absolutely authoritative precedent, one which must be followed, but is a precedent *sub silentio* and merely of persuasive authority. But all things considered I have no intention of disregarding the decision of the superior court.

The difficulty and uncertainty that I have encountered over the definition of a public officer in its application to the 1st accused can I think be explained. I shall now try to do so before proceeding to the second ingredient which the prosecution has to prove in this case.

The Prevention of Corruption Act, 1961, the Emergency (Essential Powers) Ordinance No. 22 of 1970 and Chapter IX of the Penal Code are quite adequate and effective in dealing with corruption and corrupt practices in the country. The provisions of these enactments can be invoked and applied against any person who contravenes them. But in the case of Datuk Tan Cheng Swee certain unforeseen events had made his position unique in so far as the Emergency (Essential Powers) Ordinance No. 22 of 1970 is concerned. No one could have foreseen the chain of events which took place whereby Datuk Tan Cheng Swee was in the end placed in a position where he would be the sole authority for the approval of building plans while being at the same time the executive chairman and shareholder in a company engaged in a housing project.

It could not be foreseen that a Municipality in the country would one day have its constitution suspended, that its powers and functions would all be transferred to a single individual who would be styled as the Commissioner and that well after the enactment of the Emergency (Essential Powers) Ordinance

No. 22 of 1970 on February 21, 1970 the Commissioner would become the executive chairman and shareholder of a private limited company whose main object from the day of its incorporation on June 8, 1973 was to build a large number of houses the plans of which would have to be approved by the Commissioner in the exercise of his absolute powers which were conferred on him by the Malacca Municipal Council (Transfer of Functions) Order, 1967 which came into force with effect from November 1, 1967. And as he went along exercising his powers dutifully over the years the Commissioner found himself incurring the wrath of the Public Prosecutor when he approved three plans of his own company in 1974 and 1975.

If the Legislature had the remarkable foresight of knowing or predicting that a Commissioner appointed after the suspension of the constitution of a Municipality and given all the powers and functions of that Municipality would one day be in the position in which Datuk Tan Cheng Swee was when he approved the plans of Almac it would have in all probability introduced clear and precise provisions in the law to ensure that the Commissioner would have no say whatsoever in any matter in which he may be directly or indirectly concerned. But that was not to be and Datuk Tan Cheng Swee remained in a class of his own.

In this connection Mr. Shankar's reference to the doctrine of necessity is of interest. This doctrine is concerned with the acts of administrative officers but I think it does help in appreciating the conduct of the 1st accused when he was placed in the position in which he had to approve the plans of his own company. Mr. Shankar quoted from the Judicial Review of Administrative Action (third edition) by S.A. de Smith from page 244 as follows —

"An adjudicator who is subject to disqualification at common law may be required to sit if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice. So, if proceedings were brought against all the superior judges, they would have to sit as judges in their own cause. Similarly, a judge may be obliged to hear a case in which he has a pecuniary interest. The judges of Saskatchewan were held to be required ex necessitate to pass upon the constitutionality of legislation rendering them liable to pay income tax on their salaries. Again, if a member of a professional or other organisation has so conducted himself that no disciplinary tribunal can address itself impartially towards his case, he will not inevitably be able to establish immunity from disciplinary proceedings on that ground. But the rule of necessity ought not to be mechanically applied if its enforcement would be an affront to justice (e.g. where all members of the only statutory body empowered to revoke a licence are subject to disqualifications), and it may be right for a court to scrutinise the actual conduct of the proceedings closely if the rule cannot be wholly circumvented. If it is possible to constitute a different tribunal unaffected by interest or bias, no difficulty arises. When in 1925 a case came before the Supreme Court of Texas involving an organisation called the Woodmen of the World, of which all the judges of the court were members, the Governor neatly solved the problem by appointing an ad hoc court of three women.

What would be the position in English administrative law if a Minister were to be called upon to decide whether or not to confirm an order made by a local authority affecting his own property? He could not lawfully transfer to another Minister his duty to decide. He might depute one of his own officials to make the decision; the decision would nevertheless be made in the Minister's name. It is submitted that the validity of the decision could not be challenged merely on the ground that the Minister was in a sense judge in his own cause; for the legal duty to decide the class of matter to which this belonged had been cast upon him, and upon him alone. If it were possible to show that the Minister had in fact failed to consider the merits of the order for reasons of personal interest, his decision could be successfully challenged."

The second ingredient which the prosecution has to prove is that the 1st accused did an act of corrupt practice when he signed the approval of the plans mentioned in the three charges against him. At the close of the case for the prosecution I had given a rather narrow meaning to the definition of corrupt practice as it appears in the Emergency (Essential Powers) Ordinance No. 22 of 1970. I said that the *mens rea* which was required to be proved by the prosecution in relation to this second ingredient was the knowledge on the part of the 1st accused that he was doing an act in his capacity as a public officer whereby he used his public office for his pecuniary or other advantage, that is to say, that mere knowledge by the 1st accused that he was signing the approval of the plans of Almac constituted the requisite *mens rea.*

The Federal Court in its judgment said that if the defence could satisfy the trial court on a balance of probabilities that the guilty element was absent then the accused would be entitled to an acquittal. Mr. Shankar makes this out to mean that the question of *mens rea* can now be re-opened and considered afresh after the close of the defence case. I think Mr. Shankar is right. A close study of the Federal Court judgment does indicate that the question of *mens rea* and its extent are still open.

Now after hearing the defence submission I am inclined to agree with Mr. Shankar that more is required in order to establish *mens rea* on the part of the 1st accused. It must be shown that the 1st accused approved the plans with an ulterior motive or that he abused his position as the Commissioner for his own pecuniary or other advantage.

The evidence adduced by the prosecution does not establish this *mens rea.* There is no evidence to show any ulterior motive or abuse of power by the 1st accused or that he had shown special favour to the applications of Almac. There is also no evidence that in processing the plans of Almac any department of the Malacca Municipality had given special treatment to those plans or that the approval of the plans was unduly expedited. On the contrary there is clear evidence that the 1st accused did not at any time interfere directly or indirectly when the plans were being processed in the Municipality, that he did not at any time influence the Municipal Engineer or the Building Sub-Committee to gain any favour for Almac and that it took months before Almac's plans were approved.

Even on the narrow interpretation of the term "corrupt practice" in section 2(2) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 I would say that the prosecution has failed to prove beyond reasonable doubt that the 1st accused knew that the files which he was dealing with when he signed his approvals were those of Almac. After hearing his defence I find that he has raised a reasonable doubt as to his knowledge of the identity of the applicants when he signed the minutes.

I now also agree with Mr. Shankar that the pecuniary or other advantage which is mentioned in the definition of corrupt practice in section 2(2) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 must be taken to mean wrongful or undue gain — something to which a person is not entitled or is not yet entitled or is getting something more than he is lawfully entitled. In short it must be an undue advantage. And if undue advantage is proved then it would be evidence also of ulterior motive and of abuse of power.

In the present case Almac was entitled to have its plans approved after they had been fully processed by the various departments in the Municipality which had anything to do with the processing of the lay-out and the building plans. Even if the 1st accused had not been the Commissioner the plans of Almac would have been approved in the normal course by whoever occupied the chair of Commissioner. Secondly, Almac would be lawfully entitled to the profits which Almac might have made in the housing project. The approval of the plans by the 1st accused would have in no way given to the shareholders of Almac anything more than what they would be lawfully entitled. Therefore when the plans were approved the 1st and 2nd accused derived no pecuniary or other advantage over and above their lawful shares from the profits of Almac.

On the abetment charges against the 2nd accused the evidence adduced is insufficient to establish a case against him. He was a mere shareholder of Almac and as a member of the Building Sub-Committee he and the other members in the Sub-Committee merely acted upon the recommendations of the Municipal Engineer. There is no evidence to connect the 2nd accused with the 1st accused in the sense that he had instigated or conspired or intentionally aided in the commission of any offence by the 1st accused.

The evidence in this case has not reached the high standard of proof which is required in a criminal trial. The performance of one's lawful duty exercised *bona fide* and within the limits of that duty is not a wrong. Both the accused are entitled to an acquittal and I therefore order that they be acquitted and discharged.

Accused acquitted and discharged.

Solicitors: *Shearn Delamore & Co.; Sulaiman C. Navarednam & Co.*

PLAYING CARDS (MALAYSIA) SDN. BHD. v. CHINA MUTUAL NAVIGATION COMPANY LTD.

[O.C.J. (Gunn Chit Tuan J.) May 11, 1979]
[Penang — Civil Suit No. 291 of 1974]

Shipping — Carriage of Goods by Sea — Bill of Lading — Goods not shipped on board vessel — Goods subsequently delivered by another vessel — Whether shippers liable.

In this case a bill of lading was issued for the shipment of goods on board the "S.S. Priam" for delivery to the order of the shippers in Penang. The said goods were not in fact shipped on board the "S.S. Priam" but were later shipped on the "S.S. Peisander" and delivered against the bill of lading. The plaintiffs claimed damages for failure to deliver the goods.

Held: (1) on the pleadings the plaintiff's claim was for non-delivery of goods and this claim could not succeed as the goods were in fact delivered;

(2) the plaintiff's claim for alleged damages for delay was untenable as the court could not disregard the pleadings;

(3) the defendants as shippers had discharged the burden of proving that the goods were never in fact shipped on board the "S.S. Priam" and therefore the defendants were not liable to the plaintiffs for damages.

Cases referred to:-

(1) *Janagi* v. *Ong Boon Kiat* [1971] 2 M.L.J. 196.
(2) *Blay* v. *Pollard and Morris* [1930] 1 K.B. 628, 634.
(3) *Esso Petroleum Ltd. & Anor.* v. *Southport Corporation* [1955] 3 All E.R. 864, 871.
(4) *Sanday* v. *Strath Steamship Co.* (1921) 15 Asp. M.L.C. 280 C.A.; (1920) 26 Com. Cas. 163, affirmed (1921) 125 L.T. 557; 37 T.L.R. 665.
(5) *Bennet and Yoong* v. *John Bacon Ltd.* (1899) 13 T.L.R. 204.
(6) *Thin* v. *Liverpool Brazil and River Plate Steam Navigation Company Ltd.* (1901) 18 T.L.R. 226, 227.
(7) *Grant* v. *Norway* (1851) 10 C.B. 665; 20 L.J. C.P. 93, 98.
(8) *Russo-Chinese Bank* v. *Li Yan Sam* [1910] A.C. 174, 184.
(9) *Leduc* v. *Ward* (1888) 20 Q.B.D. 475, 479; [1886-1890] All E.R. 266, 268.
(10) *Smith, Edwards & Co.* v. *Tregarthen* (1887) 56 L.J.Q.B. 437; 57 L.T. 58.
(11) *Smith v. Bedouin Steam Navigation Company* [1896] A.C. 70, 77.

CIVIL SUIT.

N. Chandran for the plaintiffs.

S. Thillaimuthu for the defendants.

Gunn Chit Tuan J.: A bill of lading bearing No. 41 dated November 21, 1973 (Exhibit D1) was issued in New York, United States of America, by Furness Withy Agencies (U.S.A.), as agents for the master of the defendant's vessel "S.S. Priam" for the shipment of 16 skids of Kraft paperboard on the said vessel from New York for delivery to the order of the shippers, P.L. Thomas Paper & Co. Inc., of New York, at the Port of Penang. The said goods were not in fact shipped on board the said vessel "S.S. Priam" but were later shipped on the vessel "S.S. Peisander" from New York to Penang manifested under bill of lading No. Memo — 1 dated May 7, 1974 to be delivered against the said bill of lading No. 41. The said vessel "S.S. Peisander" arrived at Penang on June 13, 1974 and the said goods were delivered to the plaintiff on June 28, 1974 against the said bill of lading No. 41 duly indorsed by the plaintiff on June 27, 1974. (See the reverse side of Exhibit D1).

On August 16, 1974 the plaintiff, a company in-